United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-1083

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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SECOND CIRCUIT

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LENIN ENCISO- CARDOZO, Edwin Michael Enciso, Minor :

Petitioners, :

#74-1083

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v.

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IMMIGRATION AND NATURALIZATION SERVICE, :

:

Respondent

- x

PETITIONERS' BRIEF IN SUPPORT
OF THE PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether a child who is a citizen of the United States has the right to intervene in the deportation proceedings against a parent and be considered in the adjudication of relief from deportation.

STATEMENT OF THE CASE

Nature of the Case

This is a petition to review the decision of the Board of Immigration Appeals, affirming the decision of the Immigration Judge that petitioner's motion to intervene in the deportation hearing of his parents be denied and that petitioner's parents be ordered deported from the United States.

COURSE OF PROCEEDINGS

A Hearing before the Immigration Judge in accordance with 8 U.S.C. Sec. 1252 in the matter of the deportation of the petitioner's mother took place on February 26, 1973. It was conceded that she had stayed in the United States beyond the time authorized. The infant petitioner sought by motion to intervene in these proceedings. His motion was denied by the Immigration Judge, as was the application

of the mother for indefinite extension of voluntary departure. Petitioner's mother was ordered to leave the United States voluntarily on or before May 25, 1973 or be deported.

Appeal from the decision of the Immigration Judge was filed on March 2, 1973 with the Board of Immigration Appeals. Oral argument was heard on May 21, 1973.

The decision of the Board of Immigration Appeals dated September 28, 1973 affirmed the decision of the Immigration Judge.

On January 23, 1974 a Petition to Review the decision of the Board of Immigration Appeals was filed in this Court in accordance with 8 U.S.C. 1105a (a) (1). Motion by respondent dated June 7, 1974 to dismiss the petition for review was denied without prejudice to decision on the merits by the United States Court of Appeals on June 25, 1974.

Petitioner seeks reversal of the decision of the Board of Immigration Appeals and prays that the Court of Appeals remand the case to the agency with instructions that the citizen child's motion to intervene be granted.

STATEMENT OF FACTS

Edwin Michael Enciso is a United States citizen, born on November 27, 1972 in Elmhurst, Queens, New York.

His father, Eduardo Enciso-Cardozo (A19 542 320), a 24 year old native of Mexico obtained his visitor's visa in Veracruz, Mexico, and entered the United States on March 8, 1970.

Edwin's mother, Lenin Tapia Enciso, (A19 542 321), is also a 24 year old native of Mexico. She was issued a visitor's visa in Veracruz, Mexico, and entered the United States on November 2, 1970.

Eduardo and Lenin met for the first time shortly after the latter's arrival in New York and were married in New York on September 18, 1971. Both Eduardo and Lenin stayed beyond the time authorized.

On August 30, 1972, the Immigration and Naturalization Service issued an order to show cause and a warrant for the arrest of Eduardo. A hearing was set for the next day, at which time Eduardo and Lenin appeared. Lenin was in the sixth month of pregnancy. At the hearing, Eduardo was granted voluntary departure on or before November 30, 1972. He was released on a $500 bond, pending final order of deportation.

On November 27, 1972, Edwin Michael was born. Counsel requested an extension of voluntary departure for Eduardo because of the birth of the baby and the hospitalization of child and mother. There was no response to this request.

On January 17, 1973, the child's father was informed that he had been ordered deported to Mexico. On January 31, 1973, a warrant

of deportation was issued and Eduardo was instructed to surrender for deportation on February 11, 1973.

On February 9, 1973, Eduardo Enciso, surrendered at the Immigration and Naturalization Service in New York City. An order to show cause was issued to the mother, and a hearing before the Immigration Judge was set for February 20, (later postponed to February 26, 1973), which are the proceedings which are the subject of the instant review.

Eduardo submitted an application, which was granted, for a stay of deportation, pending the decision in the deportation proceedings against his wife. The order to surrender for deportation on February 11, 1973 was cancelled. On the same day counsel attempted to file a motion on behalf of the respondent child, to intervene and reopen deportation proceedings against his father, but was advised by the Service that such motion, in view of the granting of stay of deportation, would be unnecessary and indeed premature. It was agreed between counsel that adjudication of the child's rights in the mother's case would comprehend the same issue in the father's case.

Hearing before the Immigration Judge in the matter of the mother's deportation proceeding took place on February 26, 1973. The Immigration Judge denied the respondent child's motion to intervene in the proceedings. An application on behalf of the respondent mother for indefinite voluntary departure was denied. She was ordered to leave the country on or before May 25, 1973, which has been extended by

virtue of the proceedings.

By virtue of the exception to 8 U.S.C. 1182 (a) (14) in favor of his parents because of the child's citizenship the parents have priority to immigrate as of March 29, 1973, in accordance with 22 CFR 42.62 (b) (2) (ii).

SUMMARY OF ARGUMENT

A child who is a citizen of the United States should be permitted to intervene in the deportation proceedings against his parents in order to insure a forum for the full and fair consideration of his rights as a citizen.

ARGUMENT

I. AN INFANT CITIZEN OF THE UNITED STATES IS ENTITLED TO CERTAIN RIGHTS GRANTED BY THE STATE IN WHICH HE LIVES AND BY THE FEDERAL GOVERNMENT.

Edwin Michael Enciso is a citizen of the United States by virtue of his birth in New York in accordance with 8 U.S.C. 1401 (a) (1).

Under the laws of the State of New York, the infant citizen has a right to the support and protection of his father.

The duty of the father to support his child is codified

in the laws of New York (N.Y. Family Court Act Sec. 413 (McKinney 1966).

The statute creates an obligation which is primary and absolute (Rudnick v. Rudnick, 55 Misc. 2nd 532, 285 NYS 2d 996 (1967)).

The duty of the father to support his child is fundamental, extending far beyond financial obligation. It has been characterized by the court as being "a natural right as well as a legal duty of the parent to care for, control and protect the child..." (Roe v. Doe, 29 N.Y. 2d 188, 324 N.Y.S. 2d 71, 272 N.E.2d 567 (1971)).

The duty of the father creates a corresponding right in the child. It creates a "fundamental right belonging to the child and that right cannot be abrogated or derogated by any agreement of act of the parent (Belt v. Belt, 67 Misc. 2d 679, 324 N.Y.S. 2d 623 (1971)).

Edwin Enciso, the infant citizen, has as part of his birthright the right to be raised and educated in this country. This right has been considered by the courts in the context of cases involving the custody of children, and although it may not be controlling, it is recognized by the courts to be a factor which should not be lightly regarded (Matter of Kades v. Kades, 25 Misc. 2d 246, 249, 202 N.Y.S. 2d 362, 366), People v. Uzielli, 260 N.Y.S. 2d 329).

The administrative proceeding involved here is the deportation

hearing held in accordance with the provisions of Section 242 of the Immigration and Nationality Act on February 26, 1973, to determine the deportability of the infant's mother. On behalf of the infant petitioner a motion was made to intervene in these proceedings (see Record, Item II, Transcript of Hearing in deportation proceeding, page 4-5). The motion was denied. The mother was ordered to leave voluntarily or in the alternative, be deported. The deportation of the parents will have the effect either of de facto deportation of the infant citizen or the abandonment of the infant to the charity of the State. In either event, the citizen infant's right to the support and protection of his parents in theland of his birth and citizenship will have been destroyed without his ever having been considered apart from his parents.

Before the child's right to his parents' protection and support can be subordinated to the Government's interest in deporting these parents the child's right to due process under the Fifth Amendment requires that the child's rights be considered. The burden of petitioners is to demonstrate that the best if not only method of resolving the issue is by granting the child's motion to intervene.

II. ONLY BY INTERVENTION IN THE DEPORTATION PROCEEDINGS ITSELF CAN THE CITIZEN CHILD'S RIGHT BE PROTECTED; ELSE THE PARENTS WILL BE DEPORTED AND THE CHILD'S RIGHTS WOULD NEVER BE CONSIDERED.

The case of Edwin Enciso can best be represented by independent representation. It cannot be assumed that the interest of the parents is identical to that of the child. The memorandum of law presented by amicus ably points out the importance of independent standing (see Amicus Curiae Memorandum of Law, page 2-3). The brief submitted to the Board of Immigration Appeals included an affidavit by the Assistant Administrator in the New York City Human Resources Administration, Special Services for Children, attesting to the emotional and physical needs of children and the social and financial effects of separation (see Appendix, page). Surely these are vital issues and when they relate to United States citizens they are not to be disposed of summarily and without any consideration.

The courts have "consistently" rejected the argument that a de facto deportation of minor citizens voids the deportation order of the parent (Aalund v. Marshall, 461 F2d 710 (5th Cir. 1972). If we are to agree with Ralph Waldo Emerson that "a foolish consistency is the hobgoblin of little minds", surely an unreasoned consistency is the evil genius of arbitrary results. It is precisely to make certain that basic rights will not be consistently rejected that our system of justice exists.

The court in Aalund v. Marshall stated further that its "role in this type of proceeding is not to consider the fundamental fairness of the result, but only to consider the underlying fairness of the hearing in terms of the statutory scheme and the constitution" (emphasis added).

Our contention is that the system fails when the infant citizen is deprived of an adequate forum for the consideration of the unique and particular facts of his case, and when in his absence, his constitutionally protected rights are destroyed.

That the unique and particular facts of each case must be considered in order to inhibit arbitrary action is nowhere better demonstrated than by the misguided urging of respondent that the decisions in Application of Amoury, 307 F Supp. 213 (S.D.N.Y. 1969), Faustino v. INS, 302 F Supp. 212 (S.D.N.Y. 1969) and Perdido v. INS, 420 F. 2d 1179 (5th Cir. 1969), are dispositive of the present case (Respondent's Affidavit in Support of Motion to Dismiss, page 4-5). Representation of the infant in the agency proceedings would have distinguished the basis for Edwin Enciso's claim, and clarified the significant and controlling factors on which relief might have been presented. Edwin Enciso's parents were natives of the Western, not the Eastern Hemisphere. Edwin Enciso did not seek to avoid established numerical limitations on the claim that his citizenship creates the right to the permanent residence of his parents. He did not urge that Section 201 (b) of the Immigration and Nationality Act is unconsitutional in that it discriminates arbitrarily between infant citizens and citizens who reach their majority. The facts of Edwin Enciso's case do not warrant the conclusion that Edwin Enciso's parents are people of bad moral character or that they entered into a collusive plan to enter the United States for the purpose of creating a preferen-

tial status by means of giving birth to an American citizen. The parents of Edwin Enciso undisputedly will acquire permanent residence, in accordance with 8 U.S.C. 1182 (a) (14). Edwin Enciso's claim is limited to the contention that because he is a citizen of the United States he is entitled to have the particular factors of his case considered before a decision is made as to deferring or enforcing his parents' departure from the United States during the period pending the issuance of their visas.

Courts have given backhanded or uneasy acknowledgment to the wrong of bringing about the de facto deportation of an infant citizen without considering the equities involved in his particular case. In Application of Amoury the court mentioned that "the humanitarian appeal in the instant case is less compelling than that posed in other cases" (page 217). The Court in Aalund v. Marshall, answering the objection that the agency, in passing on the question of discretionary relief, did not take into consideration the effect of the order of deportation on the minor child, rationalized that had it done so, no different result could have obtained, because the mother had not demonstrated that she was of good moral character. No less a wrong is created were Edwin Enciso to be left in the United States as a ward of the State of New York.

It had been argued that Section 106 of the Act does not preclude a minor child whose parents are under an order of deportation from bringing an action for declaratory judgement and injunctive

relief in the District Court. In Application of Amoury it was held that the District Court in the Southern District of New York had subject matter jurisdiction when the infant sought, in subtance, a permanent stay of the deportation order against his parents. It is our belief that this decision was in error and reflects a misunderstanding, if not ignorance, of the history and purpose of the 1961 amendment to the Immigration and Nationality Act (Sec.106 (b), Pub. L. No. 87-301, sec. 5, 75 Stat. 653 (1961)), in so far as the District Court assumed jurisdiction to review a final order of deportation.

Since, as here, the relief for the child when granted is to modify the final order of deportation, the deportation proceedings are the only proper forum. (Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); Foti v. INS, 375 U.S. 217 (1963)).

III. INTERVENTION IS APPROPRIATE AS A MATTER OF CONSTITUTIONAL RIGHT AS WELL AS PUBLIC AND JUDICIAL POLICY.

A. The due process clause of the Fifth Amendment includes the right to notice and the opportunity to be heard. Since the child was represented there is no question of notice. But there is the question of the right to be heard which is long established. For instance, in deciding that the United States Constitution requires that recipients be afforded a trial type hearing before termination of their welfare benefits, the Court in Goldberg v. Kelly, 397 U.S.

254, (1970), rejected the argument that consideration of the extent to which the individual may suffer grievous loss are outweighed by countervailing government interests in conserving fiscal and administrative resources.

Cutting off a welfare recipient in the face of "brutal need" without a prior hearing of some sort was held to be unconscionable and the desire to protect public funds did not justify denying the ordinary standards of due process. (Kelly v. Wyman, 294 F. Supp. 893, 899, 900 (1968)).

It is difficult to imagine what overwhelming consideration could justify the cutting off from an American citizen the consideration of the rights and benefits of his citizenship and the protection of his parents by routine rejection of his request to be heard.

B. Intervention below is the orderly process of adjudication. It permits meritorious cases to be granted appropriate relief. It satisfies the procedural requirements. It is within the agency's capabilities.

The administrative agency, expert in the technique of weighing factors relevant to the granting of discretionary relief and expert in the technicalities of the Immigration law, is the appropriate forum for the appearance of the infant citizen to inform the agency of his interest and to moderate the arbitrariness of agency action (Oberst, Parties to Administrative Proceedings, 40 Mich. L. Rev. 378 (1942)).

Indeed if Edwin Enciso's right to protection and support are cut off without the right to be heard and if review of the deportation order is solely, as stated in 8 U.S.C. 1105a, in the Court of Appeals, there would be a consitutional requirement to provide this Court a factual record on which to measure the child's claim. Of course, not all claims will require relief. In some cases the alien parent will be able to provide support for the citizen child even after deportation. In other cases the ground of deportation itself may so overbear the child's right as to require denial of relief. However, in every case an adjudication should be made. In the instant case counsel submits that substantial relief would have been granted had the child's problem been considered. How much more preferrable that the facts and preliminary adjudication be conducted by the Immigration Service in the course of an existing hearing than by the Courts.

C. The right of the infant to intervene in the deportation proceeding against his parent is protected by the rules of equitable procedure. In Leary v. U.S.,(224 US 567, 56 L.Ed 889, 32 SC 599) 1913 the court denied intervention but noted that "this case does not fall within the exception to the rule where a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated." This category of cases which support the right of the infant citizen to intervene in the absence of statutory permission or directive, embraces those cases in which a person who seeks

to intervene may as a result of the order or judgement, be left with the claim which "although technically unimpaired, is practically and factually worthless." (Reed, Compulsory Joinder of Parties in Civil Actions, 55 Michigan Law Review 327, 336 (1957)). Edwin Enciso's claim falls within this category.

In such cases, it is sufficient that the denial to intervene would result in a "practical denial of certain relief to which the intervenor is fairly entitled". (Credits Commutation Company v. United States, 177 US 311 (1899)). It is true in the instant case that the infant citizen is not in danger of losing his citizenship. But the accompanying rights to be raised here and to have the support and protection of his parents here - rights to which he is fairly entitled - would be terminated, in a practical sense, by an order of deportation against his parents. "In such cases," the court held, "an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief."

D. The intervention sought is not barred by any statute. 8 U.S.C. 1252b provides in part that:

> "...Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistant with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that..."

Few cases have dealt with the problem of intervention in proceedings before an administrative agency in the absence of specific language in the statute. Those cases which have considered the issue conclude that considerations of constitutional due process of law or requirements of fairness and equity mandate intervention. For instance, the holding in Nord v. Griffin, 86 F.2d 481 (7th Cir. 1936) required the National Railroad Adjustment Board to permit a non-member of a union to intervene in a proceeding involving the union on a question of seniority. So also in Journal Co. v. Federal Radio Commission, 48 F.2d 461, (App. D.C. 1931), under a prior statute which did not require notice or hearing on the grant of radio licenses, a license was granted to a Florida station and a Maine station on the same wave-band as that previously authorized for Plaintiff's station in Wisconsin. The Court of Appeals held plaintiff was entitled to notice and the opportunity to be heard notwithstanding the absence of statutory requirement in view of the limiting effect of physical interference of the competing licenses.

Since the statute does not require the result Respondent seeks to uphold, the problem of avoiding denial of due process does not call for an extraordinary judicial interpretation. Rather it suggests that the motion to intervene should have been granted in order to provide the required opportunity to be heard.

CONCLUSION

For the reasons stated, the decision of the Board of Immigration Appeals should be reversed and the case remanded to the Immigration Judge with instructions to grant the motion to intervene.

July 31, 1974

Respectfully submitted,

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